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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

96-128

In the Matter of)
)
Implementation of the Pay)
Telephone Reclassification)
and Compensation Provisions)
of the Telecommunications)
Act of 1996)

CC Docket No. 96-128

COMMENTS OF WORLDCOM, INC.

WorldCom, Inc. ("WorldCom"), by its undersigned counsel, hereby responds to the Public Notice ("Notice"), DA 97-1673, issued on August 5, 1997, in the above-referenced proceeding.

I. INTRODUCTION

The Notice seeks comments on issues remanded to the Commission by the U.S. Court of Appeals for the D.C. Circuit in Illinois Pub. Telecommunication Ass'n v. F.C.C.¹. At the same time, the Commission purports to clarify the status of certain requirements of the Payphone Orders² that were unequivocally rejected by the Court. WorldCom believes the Notice seriously misinterprets, and consequently trivializes, the significance of the D.C. Circuit's Opinion -- a decision which found that the Commission acted arbitrarily and capriciously in: 1) selecting the interim and permanent rates of compensation for access code and

¹ No. 96-1394, slip op. (July 1, 1997) ("D.C. Circuit Opinion").

² Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Report and Order, 11 FCC Rcd. 20541 (1996) ("Payphone Order"); Order on Reconsideration, 11 FCC Rcd. 21233 (1996) ("Payphone Reconsideration Order").

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subscriber 800 calls; and 2) requiring only large IXCs like WorldCom to pay PSPs for those calls during the first year, based on total toll revenues. Indeed, the Court concluded that the Commission's basis for selecting the per-call rate of \$0.35 "epitomizes arbitrary and capricious decisionmaking."³ As a result, the Court found that the Commission's interim compensation rules were unlawful under the Administrative Procedures Act, and granted petitions for review seeking the vacation of those rules.

Nonetheless, while WorldCom does not accept the characterization of the scope of this remand proceeding as set forth in the Notice, we file these comments responding to specific questions from the Notice. In particular, WorldCom addresses the Commission's obligations to repair both the flawed flat-rate interim compensation plan, and the per-call compensation plan which is to become effective on October 7, 1997.

II. ESTABLISHMENT OF THE DEFAULT RATE FOR SUBSCRIBER 800 AND ACCESS CODE CALLS

The Payphone Orders established a default rate of \$.35 per call to be applicable for the one year period beginning October 7, 1997. After one year, the rate was to be set at an amount equal to the local coin rate applicable to the individual payphone eligible for compensation. The Court's decision rejected both the \$.35 amount and the Commission's attempt to set the compensation rate for non-coin calls using the rate for coin calls. However,

³ D.C. Circuit Opinion at 15.

the Court left undisturbed the Commission's "carrier pays" requirement, as well as the requirement that carriers begin tracking calls on October 7. As a result, the Commission's primary goal should be to establish a reasonable -- and supportable -- per-call rate to be effective when call tracking begins. If a rate is not established prior to October 7, facilities-based carriers will be unable to pass through compensation expenses to resellers and other customers. Therefore, in short order the Commission must determine the per-call rate to be applicable for the first year.

The Commission has asked for information concerning cost differences to the PSPs in handling various call types, as well as whether the local coin rate, less expenses unique to coin calls, should serve as a per-call compensation rates. The Notice also asks whether cost differences should affect a market-based rate. WorldCom believes the Commission should reject the deregulated local coin rate as a starting point for flat-rate or per-call compensation, and instead adopt a cost-based rate. To do otherwise will allow individual PSPs to effectively set their own compensation rates unilaterally simply by raising local coin rates. This will merely compound the legal error of attempting to set the compensation rate based on certain existing local coin rates.

Per-call compensation rates should not be allowed to become inextricably linked to a "market" rate wholly unrelated to the economic costs of providing access to non-coin calls. Such a market-based approach invites abuse. A forced link between the coin rate and per-call compensation will create economic incentives

for PSPs with locational monopolies to raise local coin rates as a means of leveraging their per-call compensation. Such a link was criticized by the Court as arbitrary, and must be rejected now by the Commission.

Similarly, "0+" commissions are completely unrelated to the costs of providing "dial-around" and 800 access. These commission rates reflect the value to a carrier of being selected as the default "0+" provider. This negotiated rate is a marketing expense — it is not a cost-based rate.

WorldCom urges the Commission to instead apply TSLRIC principles and determine the forward looking costs that an efficient payphone provider would incur in providing access to non-coin calls. The Commission should then set a single compensation rate applicable to all PSPs. Such a rate could be made eligible for periodic adjustment based upon changes in TSLRIC costs. A TSLRIC based rate would also allow for a fair per-call rate to be applied nationwide. A nationwide rate is essential to ensure that facilities-based carriers like WorldCom have any reasonable chance to fulfill their tracking and payment obligations and recover per-call compensation expenses from retail customers and resellers who use the carrier's network for end-to-end transport.

III. THE INTERIM COMPENSATION PLAN

The interim compensation plan adopted in the Payphone Proceeding includes two distinct phases lasting a total of two years. The interim plan was intended to end October 7, 1998. The

first year of the interim plan consisted of the per-line compensation phase involving only large IXCs. The second phase involves the first year of per-call compensation at a fixed rate of \$.35. These timing aspects of the Payphone Orders were undisturbed by the Court. WorldCom therefore assumes that per-call tracking is to begin October 7.

The Commission structured the plan this way to provide a transition period prior to the beginning of "market-based" per-call compensation. Since the "market-based" rate was invalidated by the Court, there is no longer a reason for the Commission to require two distinct phases of per-call compensation. Rather, the Commission should determine a permissible per-call rate before October 7, and use such rate for the first year of per-call compensation and thereafter.

While the Commission seeks comment on "the proper aggregate amount of compensation PSPs should receive per payphone during the period before per-call compensation becomes available,"⁴ there appears to be no reason to make such an inquiry. Per-phone compensation -- if justified at all -- could only be applicable during the interval between the adoption of such a rate and the beginning of per-call compensation on October 7. This interval can be expected to be as brief as a few days. Determining such a per-phone rate would appear to require far more work than the effort is worth. First, any attempt to revive the flawed per-phone compensation plan would require the Commission to determine an

⁴ Notice at 2.

appropriate, imputed per-call rate. Second, the Commission would need to ascertain the respective obligations of all carriers, not just large IXC's, which carried compensable calls after November 7, 1996, the beginning of the interim period.⁵ By the time the Commission determines an appropriate imputed rate and allocation plan, per-call compensation will have already begun, and the need to determine a flat-rate will have become moot.

The Commission also asks whether annual toll revenues are the appropriate basis for allocating flat-rate compensation among all IXC's. WorldCom believes that annual toll revenues may be a reasonable allocator for most carriers, and would not object to the use of annual toll revenues as an allocator, subject to the requirement that any flat-rate plan include all carriers which are capable of handling compensable traffic. However, there may be some carriers which do not provide services which can be used from a payphone. Nevertheless, some of these carriers may have substantial toll revenues. The few carriers able to certify that they do not provide subscriber 800 service, access code calling or operator services from payphones could be exempted from any

⁵ Exclusion of LECs from such obligations as a matter of "administrative convenience" would be as unreasonable as attempting to exclude IXC's with less than \$100 million in annual revenues. Any flat-rate plan which fails to include all LECs and IXC's handling compensable calls would be arbitrary, because there is undisputed evidence in this proceeding that LECs are significant providers of both subscriber 800 and access code based services. Excluding LECs would have the effect of denying PSPs compensation for "each and every" call, and would be inconsistent with the Court's observation that including all carriers would not constitute an administrative burden because "each carrier would merely be required to write a check..." D.C. Circuit Opinion at 17.

flat-rate obligation. WorldCom believes the existing flat-rate mechanism is no longer in effect as a result of the Court's decision, so any flat-rate plan adopted by the Commission as a result of the Notice would operate prospectively. Because per-call compensation begins in just a few weeks, WorldCom believes the question of how to allocate flat-rate compensation is largely moot.

IV. COMPENSATION FOR "0+" CALLS DURING THE INTERIM PERIOD

The Notice also responds to the Court's finding that "0+" calls should have been included in the **first year** of the interim compensation plan. However, the Payphone Orders **did** provide for compensation for "0+" calls during the second year of interim compensation, which is the first year for per-call compensation. While WorldCom agrees with the Commission that compensation should be limited to situations where no compensation is already being paid to the PSP pursuant to contract, such compensation is already required by the Commission effective October 7. Any relief for "0+" calls carried by the BOCs or other PSPs before then must be limited to the interval between establishment of a new flat-rate plan and the beginning of per-call compensation. During such period, it would be inappropriate to require carriers to pay interim compensation on a per-call basis. To do so would interpose call tracking requirements which may not exist today, and which are not required by the Payphone Orders until October 7.

V. COMPENSATION FOR INMATE CALLS DURING THE INTERIM PERIOD

The Payphone Orders provide interim compensation for inmate calls, just as for other "0+" calls, beginning in the second year of interim compensation. The D.C. Circuit found that the Commission's only error was in failing to provide interim flat-rate compensation for these calls during the *first* interim year.⁶ Should the Commission establish a reasonable flat-rate for the remaining weeks before per-call compensation begins, inmate calls should be treated no differently than other "0+" calls.

VI. RETROACTIVE ADJUSTMENTS TO INTERIM COMPENSATION LEVELS AND OBLIGATIONS

WorldCom believes there is no lawful basis for the Commission to set a new per-phone rate and attempt to apply it retroactively.⁷ However, should the Commission attempt to do so, retroactive adjustments to payment obligations and compensation levels must be made to include all carriers which could have completed compensable calls during the first year of interim compensation. This would of course include the smaller IXC's and the LEC's which were improperly excluded from contributing during the initial year of flat-rate compensation.

⁶ D.C. Circuit Opinion at 19.

⁷ Among other salient reasons, the enabling statute only required the Commission to "take all actions necessary (including reconsideration) to prescribe regulations" by November 7, 1996; it did not require the actual implementation of a payment scheme, including an "interim plan," by any fixed date. See 47 U.S.C. Section 276(b)(1)(A) (1996).

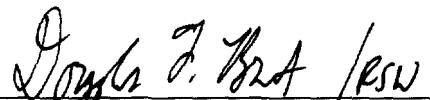
WorldCom does not believe that the Commission has the authority to require any carrier to participate in a per-phone compensation plan which applies to the period preceding adoption of a corrected interim rule. Such an attempt would constitute retroactive rulemaking, which is prohibited by the Administrative Procedure Act unless specifically authorized by statute.⁸ No authorization for retroactive compensation exists anywhere in Section 276. Accordingly, a revised per-phone compensation plan could only operate on a prospective basis, becoming effective upon issuance of an order on remand.

VII. CONCLUSION

For the foregoing reasons, WorldCom urges the Commission to: (1) set a fair compensation rate based upon TSLRIC costs, (2) apply that rate prospectively to all carriers capable of handling compensable calls, and (3) ensure that the permanent per-call rate is set prior to the effective date for per-call tracking.

Respectfully submitted,

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⁸ Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1988).

CERTIFICATE OF SERVICE

I, Cecelia Y. Johnson, hereby certify that I have this 26th day of August, 1997, sent a copy of the foregoing "Comments of WorldCom, Inc." by hand delivery or first class postage-paid mail to the following:

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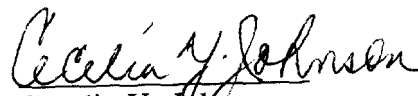
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